

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

THURSDAY, THE 23RD AUGUST 2007 / 1ST BHADRA 1929

AS.No. 166 of 1994()

OS.291/1990 of I ADDL.SUB COURT,ERNAKULAM

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APPELLANT: PLAINTIFF:

KINATTINKARA SAMOOHA MADOM, CHITTUR ROAD,
ERNAKULAM, KOCHI- 35, REP. BY THE PRESIDENT,
SRI.S.KRISHNA IYER, S/O.SANKARA SUBBA IYER,
AGED 64, 38/1648, T.D.ROAD, ERNAKULAM.

BY ADV. SRI.P.R.VENKATESH & R.AZAD BABU.

RESPONDENTS: DEFENDANTS:

1. SRI.C.RAMACHANDRA MENON, S/O.VENKITESWARA IYER,
AGED 54, BANK HOUSE, CHITTUR ROAD, KOCHI - 35.
2. SMT.LAKSHMIKUTTY, AGED 58, ALIAS AMMINI,
W/O.SREEDHARA MENON, ELAMA HOUSE, XLI/396,
RAJAJI ROAD, ERNAKULAM, KOCHI - 35.
3. SMT.RADHA RAVEENDRANATHAN NAIR, AGED 50,
'RADHIKA', XLI/397, CHITTUR ROAD, ERNAKULAM,
KOCHI - 35.
4. C.KRISHNA MOORTHY, AGED 53, 'KARTHIK'
XLI/400 CHITTUR ROAD, ERNAKULAM, KOCHI - 35.
5. SMT.RAJAMMA SANKARA MENON, AGED ABOUT 43,
'SEETHA', XLI/401, CHITTUR ROAD, ERNAKULAM, KOCHI-35.
6. SRI.C.VIJAYAN, S.V.PRINTS, AGED ABOUT 45,
XLI/408, CHITTUR ROAD, ERNAKULAM, KOCHI - 25.
7. SRI.HARI KUMAR, AGED 51, MANAGER, RESERVE BANK OF
INDIA, AUQUAF COMMERCIAL COMPLEX, GANDHI NAGAR,
P.B.NO.1, JAMMU & KASHMIR, PIN-180 004.
8. T.S.RAJAGOPALAN, AGED 48, S/O.T.R.SUBRAMANYA IYER,
SAMOOHAM BUILDING, CHITTUR ROAD, ERNAKULAM,
KOCHI - 35.

BY ADV. SRI.P.K.M.HASSAN - R1 TO R7
SRI.P.G.P.PANICKER -R8

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD
ON 23/08/2007, ALONG WITH AS NO.569 OF 1994, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

A.S.Nos.166 & 569 of 1994

Dated this the 23rd August, 2007.

J U D G M E N T

These two appeals arise from the decrees and common judgment passed in O.S.Nos. 291/1990 & 84/1991, on the file of the Subordinate Judges' Court, Ernakulam. Both suits were filed by Kinattinkara Samootha madom, represented by its President, S.Krishna Iyer. Initially, the appellant filed a suit for injunction along with a petition for injunction before the District Court, Ernakulam, (Vacation Court) during Christmas Vacation. The suit was made over to the Munsiff's Court and numbered as O.S.No.6/1990. During the pendency of that suit, plaintiff in that suit filed O.S.No.291/1990 in respect of the very same property before the Subordinate Judge's Court, Ernakulam, for setting aside a sale deed, executed by the defendants 1 to 7, in favour of the 8th defendant, and also for a decree of recovery of possession of suit properties, on the strength of Ext.A8 settlement deed. Subsequent to the filing of O.S.No.291/1990, the suit, pending before the Munsiff's Court was transferred to Subordinate Judges' Court, Ernakulam, and re-numbered as O.S.No.84/1991. Both suits were consolidated and tried jointly. After

trial, the learned Subordinate Judge dismissed both the suits. Challenging the decree and judgment passed in O.S.No.291/1990, the plaintiff filed A.S.No.166/1994 before this Court. A.S.No.13/1994 was filed before the District Court challenging the decree and judgment passed in O.S.No.84/1991. That appeal was withdrawn to this Court, re-numbered as A.S.No.569/1994 and heard along with A.S.No.166/1994.

2. O.S.No.6/1990 was filed a decree of permanent injunction with the following material averments. The plaintiff Samooham is a religious and charitable institution in Ernakulam. It is having a temple in the Samooham property and also an auditorium, by name, "Gangothri", facing Rajaji Road. Administration of plaintiff Samooham is being carried out by a committee. The pleadings were verified and signed by the then President of Samooham. He was competent to institute the suit for and on behalf of the Samooham. The plaint schedule property originally belonged to Late S.Venkiteswara Iyer, who was an active member of the plaintiff Samooham. He was having deep faith in the daily poojas and ceremonies conducted and offered in the Samooham temple. Late Venkiteswara Iyer used to conduct daily poojas on account of his

family, on and from 24th day of Meenam, 1102, spending his own money. He wanted to continue the said Nithya Pooja for all time to come without any default. This arrangement is known as "Swastha", in any religious institution or temple. Late Venkiteswara Iyer executed a settlement deed in the year 1103, dated 7.3.1103 M.E. Under the settlement deed, the plaint B schedule property was gifted to the plaintiff with certain conditions. Under that gift deed, 4.100 cents (0.01.66 ares) of property with a building bearing Door No.425 in Ward No.11 of erst while Ernakulam Municipality, was gifted to the plaintiff. In the settlement deed, there were certain directions under which the plaintiff can interfere and resume possession of the plaint schedule property and take income there from, and perform the Nithya Pooja, referred to above. Thus the plaintiff got a vested right over the suit property. Venkiteswara Iyer died on 9.4.1120. He had executed a Registered Will on 30.3.1120, and the same was registered on 2.4.1120. As per the last Will of Venkiteswara Iyer also, plaint schedule property is to vest in the plaintiff Samootham.

3. In paragraph 8 of the plaint, it was averred that the plaint schedule property originally belonged to plaintiff Samootham and was outstanding on lease (Pattam). It was a part and parcel of the

Samootham premises and property. Late Venkiteswara Iyer wanted the plaint schedule property to vest in the plaintiff Samootham, as evident from the Settlement Deed of 1103, and his last Will referred to above. After the death of Venkiteswara Iyer, the said properties were managed by his heirs. They executed a sale deed in favour of the defendant in that suit. The plaintiff contacted the legal heirs of Late Venkiteswara Iyer, and they assured the plaintiff that they will make necessary safe guards and arrangements for performance of Nithya Poojas in the samootham. The defendant was making attempts to demolish the tiled buildings in the plaint schedule property, in order to put up a new structure. Hence the suit, for a declaration that the plaintiff is the owner of the property and entitled to be in possession, on the strength of the Settlement Deed and the last Will executed by the late Venkiteswara Iyer, and also for a decree of permanent prohibitory injunction.

4. The defendant filed a written statement contending that the suit as framed is not maintainable. It was contented that the suit is barred for non joinder of necessary parties. The owner of the suit property had created a document in the year 1103, expressing his desire to conduct poojas in the Samootham and ear-marking certain

property for that purpose. The document never created any right or interest over the property in favour of plaintiff. There was no dedication of any property nor was there any gift as alleged. It was admitted that property mentioned in the document of 1103 was the plaint schedule property and the building therein. Even though the settlement was executed 62 years prior to the date of filing of the suit, plaintiff Samootham never got possession of suit property. No occasion or contingency had arisen to take possession of the property at any time. No right also was given to any one over the property. The Executant of the document died about 45 years back leaving a Will. The Will was probated and the legatees were in possession and management of the estate of the deceased including the plaint schedule property. The legal heirs were collecting rent from the tenants and plaintiff Samootham never raised any objection to the dealings of the properties by the legal heirs, nor had the Samootham raised any complaint or claim based on the strength of the document of 1103. It was further contented that Samootham was accepting Pattom from Late Venkiteswara Iyer's heirs upto 1984, and thereafter, from the defendant. Ever since the death of Venkiteswara Iyer, the poojas were being regularly conducted by the legal heirs of the deceased and ample provision has been made by them to conduct the

poojas without failure or break. The heirs of Late Venkiteswara Iyer sold the property to the defendant in 1984, and the plaintiff was aware of the said assignment in the year 1984 itself. The document was prepared and written by late N.Muthukrishna Iyer, who was the Manager cum member of Samooham committee. The plaintiff had no locus standi to challenge the assignment or to question the right of defendant to act for urgent repair and remodel the existing building, without demolition. The building was more than 70 years old. It is dilapidated and about to fall. The defendant obtained necessary sanction from the Corporation for remodelling the existing building.

5. Plaintiff did not obtain title or possession or interest over the property of the building. Under the Will executed by Venkiteswara Iyer, no vesting of any property in favour of the plaintiff Samooham had taken place. The Will and settlement were the documents indicating the desire of late Venkiteswara Iyer to conduct the daily pooja, and a direction to the members of his family to conduct the same from out of the income from a particular property. It was specifically contented that there had never been any gift, dedication or vesting of any property to the plaintiff Samooham. There had never been any complaint of any failure in the conduct of

poojas, and, even if there was any default in the performance of pooja, the heirs of Late Venkiteswara Iyer alone were liable and not the property. As per the last clause in the settlement deed, a sum of Rs.150/= per annum by way of interest has to be obtained by Samooham and sufficient amount to procure that interest has to be reserved to exonerate the property from its burden. Late Venkiteswara Iyer had expressed his desire to conduct nithya poojas and had made an offer to Samooham, which had never been accepted or acted upon for the past 65 years by Samooham. After the death of Venkiteswara Iyer, there were three Presidents, and no one had cared to accept the offer and take up the responsibility to conduct the poojas. Hence, he prayed for a dismissal of the suit.

6. O.S.No.291/1990 was also filed by the plaintiff in O.S.No.84/1991 on identical averments, for setting aside the Sale Deed No.3936 of 1984 of the Ernakulam Sub Registry executed by heirs of Venkiteswara Iyer, in favour of the defendant in O.S.No.84/1991. The defendants 1 to 7 were heirs of late Venkiteswara Iyer and the assignee was the 8th defendant. Defendants 1, 4 and 5 filed a joint written statement. Defendants 2, 3 and 6 filed another written statements. 7th and 8th defendants filed separate

written statement. Substantial contentions raised in all the written statements were same. The main contentions raised was as follows. Venkiteswara Iyer started poojas in 1102. In 7.3.1103, he executed Ext.A8 settlement deed for 'Pakal Pooja' and under Ext.A4 settlement, he provided an amount of Rs.1500/= for 'Rathri Pooja'. The averment that plaintiff Samootham got a vested right was denied. For the morning pooja, an amount of Rupees Five annas and six paise per day was necessary, and at the time of filing of the suit, defendants were paying an amount of Rs.5/= per day, that is to say, a total amount of Rs.1825/= per year. It was also contented that legal heirs can very well avoid the liability of conducting daily poojas by paying a consolidated amount to Samootham and instead of doing that, still they are getting the poojas performed by regularly paying an amount of Rs.1825/= per year. It was contented under Exts.A8 and A9, it was specifically mentioned that poojas would be performed continuously without any break. Ext.A8 was for morning pooja and Ext.A4 was for evening pooja. It was contented that Venkiteswara Iyer never had intention to convey the little of the suit property to Samootham, and there was no gift or transfer of any kind.

7. Both the suits were consolidated and tried jointly. O.S.No.291/1990 was treated as the main case and evidence was recorded in that case. On the side of the plaintiff, Pws. 1 and 2 were examined and Exts.A1 to A9 were marked. PW.1 was the President of the Samooham and PW.2 was an independent witness examined to prove Muthukrishna Iyer's hand writing. No oral evidence was adduced by the defendants. Exts.B1 to B36 were proved and marked on the side of the defendants. The Trial Court found that suits were maintainable and the person who signed the pleadings was authorised to sue for an on behalf of Samooham, and it was not necessary to file a suit on a representative character. It was also held that suits were properly valued. But the learned Sub Judge found that the suits were barred by limitation. It was held that Article applicable to cases of this nature is Article 59 of the Limitation Act, and Articles 66 and 92 have no application to the facts of such cases. It was further held that plaintiff was not entitled to get Ext.A5 sale deed set aside. Hence, both the suits were dismissed. Challenging the decrees and common judgment, these appeals are filed.

8. The following points arise for consideration in these appeals.

(i) Whether the finding of the court below that the plaintiff Samooham did not get any right, title or interest over the suit property under Ext.A8 settlement deed, and hence, is not entitled to get the relief of setting aside of Ext.A5 sale deed is correct, and

(ii) Whether the finding of the court below that the suit is barred by limitation is correct.

9. **Point No. I:-** The learned counsel appearing for the appellant-plaintiff has vehemently argued that the court below misconstrued and misinterpreted the terms of Ext.A8 settlement deed. It is argued that Ext.A8 is a gift, pure and simple, which had taken effect, and donee got absolute title and possession over the suit property. It is argued that the defendants 1 to 7 were having possession over only the buildings and not over the land. It is also argued that the terms of Ext.A8 are very clear and unambiguous, and if the executant or persons claiming under him alienates the suit property, the Samooham gets a right to re-enter the property.

10. Senior Advocate Sri.P.G.P.Panicker, appearing for the 8th respondent, has argued that Ext.A8 does not satisfy any of the requirements of a valid gift. It is argued that to constitute a valid gift, there must be a donor, donee, creation of right in presentee, and

acceptance of that right by the donee during the life time of donor. It is argued that a reading of Ext.A8 will show that there was no donee and there was no acceptance of a gift. It is also argued that a reading of document will make it clear that no right in presenti was created over the property and the sole intention of executing such a document was to generate income for the conduct of morning poojas without any interruption for all time to come. Late Sri.Venkiteswara Iyer never had any intention to convey any interest over the land to Samooham. It is also argued that the intention of the Venkiteswara Iyer is clear by reading of Ext.A9 as well as Ext.A8 settlement deed. A reading of the contents of these documents will show that he executed Ext.A8 and Ext.A4 with intention to raise necessary funds for performing the poojas of the temple situated in the property without any interruption.

11. The core question arising for consideration is what exactly is the nature of Ext.A8 document. It is true that there is a recital in the document that property is valued at 2000, and there is a '*Dhatham*' (.....) in favour of the Samooham. The learned counsel appearing for the plaintiff relying on Malayalam English Dictionary written by Prof. M.A.Warrier and others, has argued that the

meaning of the word '*Dhatham*' is "*What is given or a gift*". It is true that the word '*Dhatham*' means gift also. But it has got another meaning as, "what is given" also. It is trite law that while construing a document, to find out the intention of the executant, the document as a whole should be read, and words should be construed in its natural sense. In **Abdulla Ahamad v. Animendra Kissan Mitter** (AIR 1950 SC 15), the Supreme Court has held that it is permissible to look into the subsequent conduct of the parties to find out the nature of the document and intention of the parties and the evidence of such conduct is relevant. It was further held that evidence of conduct of the parties as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties.

12. As I have already stated, law on the point is clear. The document should be read as a whole. The intention is to be gathered from reading of the document as a whole, and if a document is intended for transfer of ownership, parties must state that fact clearly. (See **Narmadaben Maganlal Thakker v.**

Pranjivandar Maganlal (1997 (2) SCC 255); **Keshav Kumar Swarup v. Flowmore Private Limited** (1994 (2) SCC 10) and **Ram Kishorelal and another v. Kamal Narayanan** (AIR 1963 SC 890).

13. Ext.A8 contains the word '*Dhatham*'. The nature of the document was described as follows. -----

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14. Nobody had represented the Samootham or accepted the same. The document contains eight clauses. First clause reads as follow:-

The description of the property is as follows:-

So, it is clear that the donee, if any, under Ext.A8 is not plaintiff Samootha Madom, (the association of persons) which has filed the present suit, but Lord Sastha in the temple situated in the land belonging to Samootha Madom. The appellant has no case that any sort of morning pooja and evening pooja is being conducted in the office of the plaintiff Samootha Madom. If as a matter of fact, intention was to give the property to the plaintiff Samootha Madom, which claims to be a trust, the alleged donee should have been described as Samootha Madom and not as '*Samootham*'.

15. A reading of the document further shows that a chitty was started for generating funds to perform daily poojas. That also stopped. So, Late Sri.Venkiteswara Iyer started nithya pooja for his family from 24.8.1102 onwards. The document is described as settlement at first and in the operative portion, it is described as According to me, a proper reading of Ext.A8 will show that what was given by Venkiteswara Iyer was the source for raising necessary funds for daily poojas of the Lord Sastha temple situated in the property, owned by the Samootha Madom, and not a gift of property to appellant.

16. In clause No.2, the amounts necessary for daily poojas and the total amount needed for one year were calculated. The settlor had fixed yearly rent of the building and had stated that, after deducting the amounts necessary for paying the municipal tax, the rent due to Samootham and repairs etc., there was sufficient funds for performing the poojas. It was also stated that in case of value of the pooja articles goes up, there will be corresponding increase in the rate of rent also. It was further stated that the executant himself will be in possession and enjoyment of the properties described in Ext.A8. After his death, his heirs will be in possession of the same and they will perform the poojas. It was further stated that in case of any default, Samootham can enter into the property and take income from the same for the purpose of performing poojas. It was also stated that in case it is found that the suit property can be relieved of this burden by providing fixed asset which will fetch a return of Rs.150/= per year, or a fixed deposit which will fetch a monthly interest of 10 annas and total interest of Rs.150/= per year. It is stated as follows:-

17. A reading of the entire document shows that a burden is created on the property for the purpose of finding the resources for conducting morning poojas without any interruption.

18. There are certain other important aspects also. As I have already stated, the settlement was not in favour of plaintiff Samootha Madom, but in favour of the temple. There is no donee in the document. In fact, Ext.A8 is a photo copy of the document. It is an incomplete document also . It does not contain endorsement as to who presented the document for registration and who got it back.

There is absolutely nothing on record to show that any person who was competent to represent either the temple or the Samootha Madom accepted the gift during the life time of Venkiteswara Iyer. Further, no mutation was effected, and the B Schedule continued to be in the possession of Late Sri.Venkiteswara Iyer and after his death, his children were in possession of the property. The intention of the settlor was not to create any right in presenti to any diety or organisation, but burden the property to generate an income of Rs.150/= per year. Ext.A4 is the subsequent settlement deed executed by the Venkiteswara Iyer in favour of the plaintiff. In Ext.A4, it is stated that,

19. Ext.A4 was executed for generating funds for performing evening pooja. A charge of Rs.1500/= was created for evening Pooja.

20. The evidence on record show that Venkiteswara Iyer originally belonged to Tirunelveli District, Tamil Nadu. He came to Kochi and was doing various business, including Hundiya and Banking business. He had married Kuppachi @ Parvathi Ammal, from his native place, and a daughter by name Sarada was born in that wedlock. Subsequently, he had married a Nair lady, by name, Seethammal, at Kochi, in Sambandom form of marriage, and in that marriage, defendants 1 to 7 were born. He executed a Registered Will in the year 1109. After the death of Venkiteswara Iyer, Seethammal filed O.P.No.15/1120 for probate. The plaint schedule property was also subject matter of that Original Petition. In the liabilities also, Ext.A8 settlement was also mentioned. If, as a matter of fact, that was an absolute gift, there is no necessity to include that item either as an asset of the deceased, or as a liability. If the property was gifted, at the time of death of the donor, he will have

no title or possession over that property. There will not be any liability also. So, it is clear that Ext.A8 was not a gift executed by Late Sri.Venkiteswara Iyer in favour of plaintiff Samootha Madom.

21. In the plaint itself, it was admitted that the plaint schedule properties originally belong to plaintiff Samootha Madom. It was also admitted that property was outstanding on lease and lease hold right in respect of the suit property was purchased got assigned by the deceased Venkiteswara Iyer. The learned counsel appearing for the respondent argued that the properties were outstanding on lease with one Venku Iyer, who was a cloth merchant in Ernakulam. He subsequently became insolvent, and his lease hold right over the land and building was sold by the official receiver appointed in the Insolvency proceedings. That right was purchased by Venkiteswara Iyer. It was pointed out that after the purchase, Venkiteswara Iyer was regularly paying ground rent to Samootha Madom, though he was the President of the Samootha Madom till his death. It is also pointed out that PW.1 had admitted that after the death of Venkiteswara Iyer, his heirs were paying ground rent. In fact, Ext.D2 series shows that plaintiff Samootha Madom accepted ground rent from the 8th defendant also. It is to be noted that Ext.A8 document was executed in year

1103, and during that period, the lease hold right was not considered as a valuable right and lessee had only a very precarious right. It was admitted by the plaintiff itself that Venkiteswara Iyer was a very active member of the Madom, and he played a very active role in the day to day working of the Samootha Madom. Venkiteswara Iyer was the President of the Samootha Madom for more than 25 years. If as a matter of fact, he wanted to give back the plaint schedule properties to Samootha Madom, there was no need to execute a gift deed. He could have very well executed a release deed in respect of the suit properties and building in favour of the plaintiff. He never did it, which necessarily supports the case of the defendant that Venkiteswara Iyer had no intention to gift the suit properties to Samootha Madom.

22. Venkiteswara Iyer had only a lease hold right over the property. If as a matter of fact, he gifted that lease hold right to the paramount owner, there will be a merger of inferior right with the superior right and there after, no lease hold right survives. If that be the case, the plaintiff has to be explain why the plaintiff collected ground rent from the lessees till 1984. That also fortifies the case of the defendant that there was no gift of the properties to the Samootham.

23. It is admitted by both sides that Ext.A5 sale deed executed by heirs of Venkiteswara Iyer was written by Muthukrishna Iyer. It was he who presented the document for registration also. Admittedly, Muthukrishna Iyer was the manager of the plaintiff organisation until his death. According to the plaintiff, it came to know about Ext.A4 only after the death of Muthukrishna Iyer. The plaintiff has got no case that Muthukrishna Iyer had acted against the interest of the Samootham at any point of time. He may have some obligation towards Venkiteswara Iyer because he was the manager of Venkiteswara Iyer also. The plaintiff has no case that Muthukrishna Iyer colluded with the children of Seethammal, and was acting against the interest of Madom, to which he was an active member.

24. The facts and circumstances discussed above clearly establishes that Venkiteswara Iyer never intended to gift suit property of buildings standing thereon to the Samootha Madom. His intention was to see that daily poojas in the temple situated in the property of Samootham goes on regularaly, without any break. Ext.A8 was executed only to make a provision to generate funds. So, I do not find any reason to interfere with the findings of the court below that

the plaintiff failed to establish that the suit properties were gifted to plaintiff Samootha Madom by Late Venkiteswara Iyer under Ext.A8. So, the appeals are only to be dismissed.

25. **Point No.II:-** In view of my finding on point No.I, it is not necessary to consider whether the suit barred by limitation or not. That issue is left open to be decided in appropriate proceedings.

In the result, A.S.Nos.166/1994 & 569/1994 are dismissed. The parties are directed to bear their respective costs.

**K.PADMANABHAN NAIR,
JUDGE**

nj.

K.PADMANABHAN NAIR, J.

A.S.Nos.166 & 569 of 1994

J U D G M E N T

Dated:23rd August, 2007.
